



Comptroller General
of the United States
Washington, D.C. 20548

J. Melody
148020

Decision

Matter of: Gunn Van Lines; Department of the Navy--
Reconsideration

File: B-248131.2; B-248131.4

Date: November 10, 1992

Richard B. Oliver, Esq., and Carol R. Brophy, Esq., McKenna & Cuneo, for Gunn Van Lines, the interested party/requester. Douglas Larsen, Esq., and Demetria Carter, Esq., Department of the Navy, for the agency/requester. John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration based on alleged errors of fact and law is denied where fact in question had no bearing on decision and there is no showing that decision was legally erroneous.
2. Agency request that recommendation of termination for convenience followed by award to protester be changed to allow award to stand is denied where request is based on several factors--e.g., agency good faith, high termination costs--that either are not supported in the record or on their face do not warrant withholding award to firm properly entitled to it.

DECISION

Gunn Van Lines and the Department of the Navy request reconsideration of our decision Hawaii Int'l Movers, Inc., B-248131, Aug. 3, 1992, 92-2 CPD ¶ 67, in which we sustained the protest of Hawaii International Movers, Inc. (HIM) under Department of the Navy request for proposals (RFP) No. N00604-92-R-3113, for packing and crating services.

We deny the requests.

HIM's original protest was based on the Navy's decision to reopen negotiations after award had been made to HIM, and HIM's price had been disclosed. The Navy's decision was based on the following circumstances. Gunn's initial proposal offered a lower price than Gunn's. In response to a request for best and final offers (BAFO) following issuance of an amendment to delete the evaluation of options, Gunn increased its price to \$3,450,175, while HIM left its price

unchanged at \$3,133,275, and thus became the low offeror. For reasons not relevant here, the Navy then requested second BAFOs. Gunn left its price unchanged, but HIM offered a blanket \$50,000 reduction (to \$3,083,275) to its already low price. However, HIM did not include an amended price schedule with its second BAFO showing the line items where the price reduction was intended, and the agency determined that this omission made it impossible to determine which combination of offers would result in the lowest cost to the government. The contracting officer thus contacted HIM to find out which line item prices were reduced, and reportedly (HIM actually refutes this) was told that line item 0001A was meant to be reduced. Based on this information, HIM received the award based on its low price.

Gunn then protested to our Office that HIM improperly had been permitted to engage in post-BAFO discussions while Gunn had not. The Navy ultimately agreed with Gunn and reopened the competition even though HIM's low price had been disclosed. In the ensuing third round of BAFOs, Gunn lowered its price to \$2,973,290, while HIM raised its price \$50,000 to \$3,133,275. HIM protested any award to Gunn in a March 4, 1992, agency-level protest, but the Navy nevertheless made award to Gunn on that date. After the agency denied the protest on March 18, HIM protested to our Office on the ground that the communication concerning the line items affected by its blanket \$50,000 price reduction had constituted a permissible clarification, not discussions, and that it therefore was improper to reopen the competition after award.

We agreed with HIM, and sustained the protest, finding that the Navy's conclusion that the communication with HIM had constituted discussions was based on the incorrect premise that the discussions were necessary because unit prices were needed to determine the combination of offers that would result in the lowest price. In fact, we held, under the evaluation provisions in the RFP HIM's total price was sufficient to make this lowest price determination. We also noted (the Navy did not raise the point) that, although the omission of amended unit prices rendered HIM's price ambiguous, this did not warrant reopening the competition after HIM's price had been disclosed, since the only uncertainty was as to how low HIM's price was (not whether its price was low), and HIM thus gained no competitive advantage over Gunn by virtue of the post-BAFO communication with the Navy.

GUNN'S RECONSIDERATION

Gunn first argues that the conclusion in our decision that HIM's second BAFO contained firm unit prices was factually incorrect because HIM itself disputed that it had told the agency it intended to reduce its line item 0001A price.

Gunn concludes that, even if the communication constituted a clarification, HIM's position demonstrates that the price was never clarified by HIM. This argument is without merit. Our decision did not turn on whether HIM's unit prices ultimately were definitized. Given that the reduced unit prices were not necessary for the evaluation, the agency merely had to obtain the prices prior to award to assure proper payment under the contract. Whether adequate prices actually were obtained, or now can be obtained, for this purpose is a matter of contract administration, which is not for review by our Office, 4 C.F.R. § 21.2(m)(1) (1992), and thus is not a basis for reconsidering our decision.

Gunn also maintains that our holding that the ambiguity in HIM's proposal was not a proper basis for conducting discussions is inconsistent with prior decisions of our Office to the effect that discussions may not be held with only one offeror after receipt of BAFOs, and that unit prices are material terms of a proposal. Gunn believes we improperly disregarded the agency's discretion to conduct discussions to clarify the ambiguity.

Gunn's characterization of our prior decisions is accurate, but its emphasis on those decisions is misplaced. As we recognized in our initial decision, while under normal circumstances the ambiguity in HIM's proposal would be subject to correction through discussions, the circumstances here warranted a different result. Specifically, although HIM's second BAFO price reduction rendered its unit prices indefinite, since the firm did not alter any other terms of its first BAFO (which included unit prices) it was clear that the only uncertainty was which unit prices would be reduced and by how much. As the uncertainty thus did not bear on the total price evaluation, which was the basis for award, it was our view that reopening the competition after award and disclosure of HIM's low price was not warranted.

Gunn does not address this rationale in its reconsideration request, and also ignores the cited cases on which our conclusion was based. One of these cases, BDM, Int'l, Inc., 71 Comp. Gen. 363 (1992), 92-1 CPD ¶ 377, involved a similar attempt by an agency to correct what it perceived as a failure to conduct adequate discussions (award had been made on the basis of initial proposals) by reopening the competition after award. In finding that the agency's action was not warranted, we stated (as we stated in our initial decision) that:

"[W]here the record establishes that there was no actual impropriety, or that an impropriety did not result in any prejudice to offerors, reopening the competition after prices have been disclosed does not provide any benefit to the procurement system

that would justify compromising the offerors' competitive positions. Rexon Tech. Corp., et al., B-243446.2; B-243446.3, Sept. 20, 1991, 91-2 CPD ¶ 262. . . ."

It remains our view that it was improper for the agency to reopen the competition under the circumstances, and this view clearly is consistent with our prior relevant decisions. Gunn's reconsideration request therefore is denied.

NAVY'S RECONSIDERATION


The Navy does not challenge the rationale of our decision or our conclusion. Rather, it maintains that, contrary to our Bid Protest Regulations, 4 C.F.R. § 21.6(b), we failed to consider "all the circumstances surrounding the procurement" in fashioning our recommendation that Gunn's contract be terminated for the convenience of the government and that award be made to HIM. The specific facts relevant to this issue were not included in the original protest record; the agency now lists several considerations it believes warrant allowing Gunn's award to stand. Specifically, the Navy notes that: (1) the contract runs only from March 4 through December 1992, so 8 months of the contract will have run by the end of the 60-day period for implementing our August 3 decision; (2) changing contractors will be disruptive; (3) a new solicitation was to be issued in late August 1992 for a 3-year period; (4) the agency will have to pay Gunn's termination costs, which Gunn has preliminarily estimated at \$350,000; and (5) the agency acted in good faith.

These circumstances do not warrant changing our recommendation. First, the fact that a significant portion of the contract has run (or that a new solicitation has been issued for the following year's requirements) is not a consideration that bears on the practicability of awarding a new contract; we were well aware when we issued our decision that award already had been made and that several months of the contract thus already had been performed by Gunn. We saw no reason why HIM, the rightful awardee, should not be permitted to perform whatever remained of the contract term. Similarly, we realized that there would be some disruption caused by a change in contractor, but we saw no reason to assume that this disruption would be particularly great for this type of contract; the Navy has not explained why this would be the case. We also were well aware that the agency would be liable for termination costs; again, however, there was no reason to believe, and there has been no showing, that a contract such as the one here for packing and crating services would involve unduly high costs that might have to be reimbursed. The "preliminary estimate" provided by Gunn has not been justified; the Navy specifically informs us

that the contracting officer has not audited or endorsed these costs. Finally, the fact that the Navy acted in good faith simply did not diminish HIM's entitlement to a contract.

We conclude that the information on which the Navy's request is based is either inadequately supported, or on its face does not warrant altering our recommendation that Gunn's contract be terminated and that award be made to HIM.

The requests for reconsideration are denied.

for 
Comptroller General
of the United States